

Commonwealth of Massachusetts

**Board of Registration  
of  
Hazardous Waste Site Cleanup Professionals**

**PROFESSIONAL CONDUCT  
COMMITTEE**

**Minutes of Meeting on February 10, 1998**

Prepared By: Tara Zadeh

Meeting Location: GZA, GeoEnvironmental, Inc., Newton, Massachusetts

1. **Call to Order:** The meeting was called to order at 1:10 p.m. by Co-chairperson John Seferiadis. Also present were Lawrence Feldman, Debra Phillips, Sarah Weinstein, Gail Batchelder. Staff members present were Allan Fierce, Tara Zadeh, Ed Unser and Dan Ciccariello. Also present was Robert Donovan, Acting Deputy Assistant Commissioner for the Bureau of Waste Site Cleanup
2. **Announcements:**
  - A. Ms. Weinstein distributed DEP's draft policy, based on existing regulations, advising the public as to when DEP will take enforcement actions directly against LSPs and others who are not PRPs. The policy clarifies that the terms "any person," and "no person" used in key sections of the MCP, include LSPs and the firms employing them as well as other persons such as contractors and "good samaritans." According to Ms. Weinstein, this policy does not break new ground; it simply calls attention to the fact that the words "any person" and "no person" are in the regulations and that the DEP already interprets them in this manner. The policy indicates that enforcement actions against these other persons can range from NONs to higher level enforcement. The policy also reminds LSPs that, although they are not legally responsible for obtaining approvals from DEP, they should not proceed without them. The policy makes clear that an LSP must make sure that appropriate approvals have been obtained. Bob Donovan commented that DEP will still continue to cite PRPs and RPs where appropriate.
  - B. Ms. Weinstein also announced the Jim Colman is now the Assistant Commissioner for the Bureau of Waste Prevention and, after a brief transition, will no longer be working on waste site cleanup issues. Bob Donovan and Ms. Weinstein will continue acting as Deputy Assistant

Commissioners until Jim's position is filled.

3. The draft minutes of the meeting held on January 20, 1998, were approved as amended by some editorial comments on page 2 provided by Ms. Weinstein.

4. **Old Business:**

- A. **Status of Complaint Review Teams** Ms. Zadeh briefly reported that aside from the CRT Reports before the Committee today, the remaining CRTs are still investigating the complaints assigned to them.

- B. **Outreach**

1. Mr. Fierce announced that he and Ms. Zadeh met with a group of BWSC staff in Springfield and that there was a good interchange and discussion. A meeting still needs to be scheduled with the Northeast Region. It was also suggested that staff return to SERO to meet with a broader group of BWSC staff members. The previous meeting was just with Audit staff.

One member suggested that Board members become directly involved in meeting with the DEP audit staff to improve communications, discuss potential complaint issues, and be available for discussion. This may help make the Board's disciplinary process become more efficient by informing the auditor staff about which types of cases the Board has determined warrant investigation. The Board members also have technical expertise and could discuss standard of care issues with the BWSC. It was agreed that this participation could begin with the next meeting arranged with the Northeast Region.

2. Ms. Weinstein was reminded that her review of the two-page outreach letter is still expected.
    3. Mr. Fierce announced that much of what is on the Board's Web site is in PDF format and is difficult to download. The staff will convert the short, general information documents on the Web to a friendlier format.
    4. Ms. Batchelder commented that the LSPA informed her that the Board's 1 1/2 page press release regarding its two enforcement actions was too long to be printed in the LSPA newsletter. The newsletter will mention that disciplinary actions were taken. Mr. Fierce was directed to contact the newsletter's editor, Jeff Hardin, to ask why the LSPA could not print a summary of the Board's disciplinary actions, just as it prints Maria Pinaud's "Audit Update."

5. **New Business:**

- A. **New Matter 97C-009**

The Board reviewed the Complaint and LSP's response previously

provided to them. The Complaint alleges that the LSP committed MCP violations in submitting a Class A-2 RAO for a site where two abandoned USTs were removed in 1994 from behind a former Town Garage.

- A motion was made by Ms. Weinstein, and seconded by Ms. Phillips, as follows:

That the Board appoint a Complaint Review Team to investigate the Complaint.

The Motion was approved: all in favor; none opposed, no abstentions or recusals.

The Board appointed the following members to the CRT: Ms. Weinstein and Ms. Stake. Mr. Feldman and Ms. Batchelder as substitutes. The staff attorney on the CRT will be Ms. Zadeh.

#### **B. Request to Reconsider 96C-002**

The Committee was presented with a letter from Bob Donovan requesting that the Committee's decision last month to dismiss Complaint 96C-002 be reconsidered. The letter states: "The Department believes that there were flaws in the complaint referral and investigation process... and that... the flaws in the process contributed to an erroneous decision to dismiss the complaint." Mr. Donovan stated he does not contend that the matter was not reviewed at all, but stressed that there were some areas that should have been given more in-depth review. There was further basic investigation that DEP contends the LSP should have done, e.g... additional surficial soil testing, since it was a tannery site. According to Mr. Donovan, the conclusion of the Board is not supported by the evidence available in DEP's files.

The CRT members present stated that, based on the information they received, they determined that the LSP could have reached the conclusion that additional soil testing was not required. The Committee discussed whether there had been proper closure to this case, which was one of the first Complaints referred from the DEP. It was suggested that before a CRT recommends closure by dismissal of a DEP referral, there should be a meeting with DEP to review the case, the reasons it was referred, and the basis for the CRT's tentative recommendation to dismiss. This practice for future CRTs was generally agreed upon. In this case, however, there was such a disparity between the conclusions reached by DEP and the conclusions reached by the Board that everyone should understand how those

different conclusions had been reached.

Mr. Donovan requested that the Complaint be remanded for further investigation. This request was met by the members of the Committee with specific questions regarding the areas which DEP contends were not adequately reviewed by the CRT. Mr. Donovan stated that DEP will submit materials in the next few weeks that answer these questions, and he apologized for having insufficient time to do this before today's meeting. Some Committee members felt that a request for reconsideration should not be granted when the specific reasons were not presented.

The Committee then had a general discussion about how to proceed.

- The following motion was made by Ms. Weinstein and seconded by Mr. Feldman:

That the LSP be informed that the request for reconsideration has been filed by DEP; that the original CRT meet with the appropriate DEP staff to review the specific grounds why reconsideration should be granted, and conduct any and all further investigation necessary; and that the CRT present to the Committee a supplemental report with one of the following recommendations: to reconsider the complaint, to confirm the dismissal of the complaint, or to take disciplinary action.

The Motion was approved: all in favor, none opposed, no abstentions or recusals.

## **C. CRT Reports**

### **0. 96C-007**

The members of this CRT were Mr. Seferiadis, Mr. Roberts and Ms. Zadeh. Ms. Zadeh provided a summary of the Complaint Review Team ("CRT") Report, as follows:

The Complainants alleged that the LSP withheld the filing of a completed RAO until full payment was received from the Complainants for both work the LSP performed for the Complainants, (in contradiction to the terms of a contract between the parties) and work performed for a subcontractor of the Complainants. The CRT investigated these factual allegations and then examined whether this action constitutes a violation of

the Board's Rules of Professional Conduct requiring an LSPs to act with reasonable care and diligence 309 CMR 4.02 (1).

The CRT concluded that the factual allegations were true: the LSP withheld a completed report from his client in violation of the payment terms in the contract, demanding payment for work the LSP performed for both the Complainants and a third party. Therefore, the LSP did not act with reasonable care and diligence in the performance of his work. The CRT determined that although this is a violation of the Rules of Professional Conduct, this is a case of first impression for the Board, the LSP has no history of this violation, there was no resulting harm to human health or the environment, and that the appropriate sanction would be a private censure.

Mr. Seferiadis, a member of the CRT stated that the LSP's conduct action was particularly egregious since it was a violation of a contract. Nevertheless, he said he questioned whether the Board should interpret section 4.02(1) of the regulations ("reasonable care and diligence") to encompass this type of conduct. Mr. Feldman agreed, stating that he believes the "reasonable care and diligence" language" refers only to the technical competence of an LSP and that the phrase was not intended to relate to the withholding of reports or LSP opinions. Mr. Fierce stressed that the language is open to interpretation by the Committee and that, because the term "diligence" includes the concept of timeliness, it would be reasonable for the Board to interpret section 4.02(1) to require LSPs to submit reports and RAOs in a timely manner, without regard to whether fees have been paid.

Mr. Seferiadis stated that he was considering reversing his position on the CRT and that he would recommend issuing an informal warning and not stating there is a violation. He would also recommend a change in the regulations so that egregious conduct like this would be specifically covered.

There was general discussions about the applicability of other language in the regulations, including the language in section 4.01 that the Rules of Professional Conduct were established to "maintain a standard of professional integrity."

- The following motion was then made by Mr. Feldman:

Move that the case be dismissed and that an informal warning letter be sent out with reference to the "professional integrity" language in 309 CMR 4.01.

The members of the Committee then realized that since Mr. Seferiadis (a member of the CRT) could not vote, there was not a quorum present for the purposes of voting whether to take disciplinary action. The discussion was tabled until the next meeting.

#### **1. 97C-004**

Discussion of this CRT report was reserved until the next meeting because neither of the Board members on the CRT was present.

#### **D. Review of 309 CMR 7.00**

Mr. Fierce reminded the Committee that in order for the Board to complete its Executive Order 384 review of its professional conduct regulations (309 CMR §§ 4 through 8) as part of the Program Evaluation, the Board needs to review a different section of the regulations at each of the Committee meetings in February, March, and April. The section he proposed for discussion at this meeting was 7.00, the Procedure Governing Disciplinary Proceedings. Mr. Fierce noted that this section had not been reviewed since the Board's first set of regulations were promulgated in early 1993. He noted that by comparison with the level of detail in the Board's disciplinary procedure flowchart, the level of detail provided in Section 7.00 was quite skimpy. The issue, he suggested, was how much of what the Board has included in the flowchart should be promulgated as regulation in Section 7.00. He suggested that the members begin by identifying those important provisions in the flowchart that the Board is confident it will not change, e.g., that complaints will be investigated by CRTs; that CRTs are composed of one LSP member, one non-LSP member, and one staff attorney; that members of CRTs do not vote when the Committee considers a recommendation from a CRT; and that the Hearing Officer makes only a recommended decision at the conclusion of an administrative proceeding.

Ms. Weinstein commented that the Board does not need at this point to actually draft the revised regulatory language that it would propose be promulgated. DEP is going through a similar regulation review for the

Program Evaluation, and for the Program Evaluation Report, it is preparing only a conceptual description of the key regulatory changes it is considering. It is not drafting proposed regulatory language.

After further discussion, the Committee members agreed that there was not enough time left today to review Section 7.00 thoroughly. The Committee directed the staff to prepare an outline of the conceptual revisions to Section 7.00 that they would recommend. Mr. Fierce stated that at next month's Committee meeting he would present this conceptual outline for review and discussion. He also stated that, to ensure that the Board can complete the entire regulation review process in time to describe it in the draft Program Evaluation chapter that the Board must review at the May meeting, the Committee must review another section of the regulations at the next meeting in March. He said he would put Section 4.00 (Rules of Professional Conduct) on the agenda for that meeting. At that meeting, he said, staff will present their suggestions regarding how best to revise Section 4.00. Then, after discussion at that meeting, staff will prepare a conceptual outline of potential revisions to Section 4.00, and the Board can review that outline at the following meeting, just as it agreed today to do at next month's meeting with the conceptual revisions proposed to Section 7.00.

6. **Future Meetings:**

The Committee agreed to meet next at 12:30 p.m. on March 10, 1998, at a location to be determined.

7. **Adjournment:**

The meeting was adjourned at approximately 4:05 p.m.

Approved on March 10, 1998